IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 606

STATE OF ILLINOIS,

Petitioner,

vs.

WILLIAM ALLEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 413 F. 2d 232 (1969). Appendix, page 59.

JURISDICTION

The jurisdiction of this Court is invoked to review a final judgment of the United States Court of Appeals for the Seventh Circuit pursuant to 28 U.S.C. §1254 (1). The judgment of the court below was entered on July 7, 1969. A petition for rehearing *en banc* was denied on August 12, 1969. The Petition for Writ of Certiorari was filed September 17, 1969, and granted December 8, 1969.

CONSTITUTIONAL PROVISION

Sixth Amendment to the United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

QUESTION PRESENTED FOR REVIEW

Whether a defendant waives his right to be present at trial by deliberate and disruptive conduct which necessitates his removal from the courtroom.

STATEMENT OF THE CASE

The facts in the instant case, as developed in the opinions of the Supreme Court of Illinois, *People* v. *Allen*, 37 Ill. 2d 167, 226 N.E. 2d 1 (1967), and the Court of Appeals below, *United States ex rel. Allen* v. *Illinois*, 413 F. 2d 232 (7th Cir. 1969), are not in dispute.

On August 12, 1956, William Allen, respondent herein, entered a tavern and, after ordering a drink, took $200 from the bartender at gunpoint. He was later arrested and identified by the bartender. Allen, in turn, identified the bartender as his victim.

Respondent was subsequently indicted, convicted of armed robbery, and was sentenced to serve ten to thirty years in the Illinois State Penitentiary.

Allen's trial commenced on December 11, 1957. The defense was to be insanity.*

Prior to trial, the respondent expressed dissatisfaction with the public defender and, after refusing court-appointed counsel, did not retain private counsel as he stated he would. Thereafter, Allen was offered the choice of the public defender or an attorney from the bar association defense committee. He refused both and requested the appointment of one from a list of attorneys he presented. The trial judge denied this request and informed respondent that a lawyer from the bar association would be appointed. Thereupon Allen became adamant in his request

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* In a 1956 pre-trial hearing, the respondent had been found incompetent to stand trial. Later, on October 19, 1957, in a subsequent hearing, Allen was declared competent to stand trial in a proceeding where he was represented by the public defender.

that he be allowed to represent himself despite the repeatedly expressed concern of the court about his ability to defend himself. The court finally acceded to Allen's demand, but in addition appointed a bar association attorney to assist and advise the respondent.

During the *voir dire* examination of the first prospective juror by the respondent—throughout which Allen had asked many irrelevant questions and indicated a lack of knowledge of the law and procedure (A. 10-19)—the trial judge instructed Allen to confine his questions solely to juror qualifications (A. 20).

Thereafter, when the court suggested that counsel take over the examination, Allen proceeded to argue with the judge in a ". . . most abusive and disrespectful manner". 413 F. 2d 232, 233. This was to culminate in a threat by the respondent that he would begin ". . . ranting in the courtroom . . ." and a subsequent warning by the judge that Allen would be permitted to be present only if he conducted himself properly (A. 24-25).

The respondent continued to talk and terminated his remarks by stating: "When I go out for lunch time, you're [the judge] going to be a corpse here" (A. 25). Allen then tore the file which his attorney had and threw the papers on the floor (A. 25). A second warning was to follow, but Allen persisted in his unruly and contemptuous remarks, threatened to disrupt the trial (A. 26), and the court finally ordered the respondent removed from the courtroom and directed the appointed counsel to proceed in Allen's behalf (A. 26-27).

After the selection of the jury the respondent was invited to return (A. 29) and although the trial judge was unable to obtain a commitment to proper conduct (A. 31), he allowed Allen to remain in the courtroom (A. 32).

Immediately upon commencement of the trial, the respondent provoked another clash with the court and his second removal occurred (A. 33). After this exclusion he remained out of the court during the presentation of the state's case in chief, except when brought in for purposes of identification. During one of these latter appearances Allen was to swear at the court while demanding his right to be present at trial (A. 38).

Before the beginning of the defense, the trial judge again offered Allen the opportunity to remain in the courtroom (A. 43). Despite only limited assurances of proper conduct, Allen was permitted to be present through the remainder of the trial.

Allen's conviction was affirmed by the Supreme Court of Illinois, 37 Ill. 2d 167, 226 N.E. 2d 1 (A. 50); and the Court denied certiorari. *Allen* v. *Illinois,* 389 U.S. 857 (1967). Allen's habeas corpus petition was denied by the United States District Court for the Northern District of Illinois on May 24, 1968 (A. 56). On July 7, 1969, the Court of Appeals reversed that judgment with one judge dissenting. *United States ex rel. Allen* v. *Illinois,* 413 F. 2d 232 (7th Cir. 1969) (A. 59).

SUMMARY OF ARGUMENT

From the earliest days of common law, a defendant in a criminal case has enjoyed the right to be present throughout all stages of his trial. This right is also guaranteed against state and federal deprivation by the Confrontation Clause of the Sixth Amendment, although this Court has held that the adoption of the Amendment was not intended to change the nature of the right, or the

qualifications of its exercise, as they existed at common law.

This Court, and the courts of almost all jurisdictions, have held that the right to be present at trial is one which can be waived by the words or actions of the defendant. Both the cases and the commentators have recognized the proposition that a defendant whose disorderly conduct compels his removal from the courtroom impliedly waives his right to be present at his trial so long as such conduct persists, and that involuntary expulsion under these circumstances does not violate the Sixth Amendment or the right of confrontation as it existed at common law.

A trial court confronted with an unruly defendant may employ any one of three sanctions to compel obedience to order in the courtroom: (1) contempt, (2) physical restraint, or (3) expulsion. The rule which this Court ought to promulgate in the administration of the Sixth Amendment guarantee is one of discretion, that is, that a trial judge ought to be able to decide which sanction to employ in light of the particular interests, of both the defendant and the state, involved in the case then on trial. Such discretion was exercised by the court which tried respondent Allen, and that court properly concluded that expulsion was the appropriate sanction to be employed in the circumstances of this case since the threat of contempt was of little significance and the employment of shackles and a gag might have unfairly prejudiced the state and respondent.

ARGUMENT

The Sixth Amendment Was Not Violated When Respondent Was Excluded From The Courtroom During Portions Of His Trial Because He Waived The Right To Be Present By His Repeated And Flagrant Disruption Of The Proceedings.

> *"The Defendant: You have the right to restrain me, but you haven't got the right to remove me and you're not going to remove me.*
>
> *The Court: I'll determine that.*
>
> *The Defendant: No, you're not. There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial."*•

A.

The Right Of Confrontation In Historical Perspective

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;

• Appendix, p. 26.

> to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The relevant portion of the Amendment which insures the defendant's right to be present through all stages of his trial is the Confrontation Clause—"to be confronted with the witnesses against him." To understand the scope and application of the guarantee, however, it is necessary to understand the right as it existed at common law, for as this Court has said on many occasions, "The right of confrontation did not originate with the provision in the Sixth Amendment, but was a common law right having recognized exceptions. The purpose of the provision . . . is to continue and preserve that right, and not to broaden it or disturb the exceptions."[1]

The genesis of the rule is to be found in the early common law requirement that no trial for felony could be had in the absence of the defendant. At that time, the rule was cast in jurisdictional terms, *i.e.*, the defendant's presence was necessary to the case and could not be waived.[2]

Importantly, the early rule has also been described in terms of recognizing interests of the state in the presence of the accused at trial. Thus Bishop has stated:

> ". . . subject to exceptions and qualifications, . . . an indicted person must be present in court whenever any essential thing is done against him. The reasons

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1. Salinger v. United States, 272 U.S. 542, 548 (1926).

2. State v. Greer, 22 W. Va. 800, 811 (1883); Noell v. Commonwealth, 135 Va. 600, 115 S.E. 679, 681 (1923). The rule was less strict as to misdemeanors. People v. Beck, 305 Ill. 593, 137 N.E. 454, 457 (1922); State v. Rabens, 79 So. C. 542, 60 S.E. 442, 445 (1908).

> are two; first, to enable the prosecuting power to identify him, and to inflict on him the pronounced punishment; secondly, to secure to him full facilities for defense. The one reason is in the interest of the State, the other, of the defendant. And these differing reasons, we shall see, are sometimes dissimilar in their effects upon a particular argument or question."[3]

As the rule developed, exceptions came to be recognized, both before and after the adoption of the Sixth Amendment. Thus defendant's right to "confront" the witnesses against him did not bar the admission of dying declarations,[4] documentary evidence,[5] or the affidavits of witnesses whose absence from the trial had been wrongly procured by the defendant.[6]

More importantly, insofar as the right to physical presence at trial is concerned, whether or not guaranteed by the Confrontation Clause in a particular case, two trends in the decisional law can be clearly noted.

First the rule of presence lost its jurisdictional character. Most courts began to hold that a defendant could waive his right to be present at the trial of a felony case.[7]

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3. 1 BISHOP'S NEW CRIMINAL PROCEDURE, p. 174 (4th ed. 1895). See also: McCorkle v. State, 14 Ind. 39 (1859).

4. State v. Bethea, 241 So. C. 16, 126 S.E. 2d 846, 849 (1962).

5. Tucker v. People, 122 Ill. 583, 13 N.E. 809, 812 (1887); People v. Jones, 24 Mich. 214, 225 (1872).

6. Reynolds v. United States, 98 U.S. 145, 158 (1878).

7. Diaz v. United States, 223 U.S. 442, 455-58; Scruggs v. State, 131 Ark. 320, 198 S.W. 694, 696 (1917); People v. Harris, 302 Ill. 590, 135 N.E. 75, 76-77 (1922).

And waiver was found not only in those cases where a defendant simply refused to participate further in the trial, and said so,[8] but also in those cases where it could be inferred from his *conduct, e.g.,* where a bailed defendant abandoned the cause or a prisoner escaped from custody during trial.[9]

An extensive examination of the principle of waiver was undertaken by this Court in *Diaz* v. *United States,* 223 U.S. 442 (1912). In that case the accused left the court in the middle of trial and sent back a message that he expressly consented to the continuation of the trial in his absence. After conviction, it was contended in this Court that:

> "the objection now made is, not that he did not voluntarily waive his right to be present, if he could waive it, but that it could not be waived, and that the court was therefore without power to proceed in his absence."[10]

The answer to this contention, the Court found, was to be determined by the meaning of §5 of the Philippine Civil Government Act, "securing to the accused in all criminal prosecutions 'the right to be heard by himself

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8. Diaz v. United States, 223 U.S. 442 (1912).

9. Sahlinger v. People, 102 Ill. 241, 247 (1882); United States v. Noble, 294 F. 689, 692 (D. Mont. 1923), *aff'd.,* Noble v. United States, 300 F. 689, 692 (9th Cir. 1924); United States v. Loughery, 26 Fed. Cas. 998 (No. 15, 631) (C.C.E.D., N.Y. 1876); Falk v. United States, 15 App. D.C. 446, 455-61 (1899).

10. 223 U.S. at 453.

and counsel' " which, the Court said, was the "substantial equivalent" of the Sixth Amendment.[11]

In construing the scope of the Confrontation Clause, the *Diaz* Court agreed with the great weight of state and federal authority which had held that,

> "the prevailing rule has been, that if, after the trial has begun in his presence, he [the defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present."[12]

The reason for the rule, the Court said, was that " 'otherwise there could be no conviction of any defendant unless he wished to be present at the time the verdict is rendered',[13] . . . neither in criminal nor in civil cases will the law allow a person to take advantage of his wrong . . . yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield."[14]

Lastly, the Court found no bar to such a holding despite earlier, and seemingly contrary, language in *Hopt* v. *Utah,* 110 U.S. 574 (1884) and *Lewis* v. *United States,* 146 U.S. 370 (1892). In both of those cases, the Court noted, "the

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11. 223 U.S. at 454-458.

12. 223 U.S. at 455.

13. 223 U.S. at 456, quoting with approval from Barton v. State, 67 Ga. 653 (1881).

14. 223 U.S. at 458, quoting with approval from Falk v. United States, 15 App. D.C. 446 (1899).

accused was in custody, charged with a capital offense, and was sentenced to death." In *Hopt*, the Court construed a territorial statute which declared that he "'*must* be personally present'" and the *Diaz* Court read the *Hopt* opinion as holding that the defendant could not, therefore, waive what was in effect a jurisdictional bar to the continuation of a trial in the absence of the defendant. The holding of *Lewis*, said the *Diaz* Court, was simply that it was error to exclude a defendant during the time when challenges were made to the seating of jurors and the defendant had properly and timely objected to proceeding in his absence.[15]

In sum, then, a historical perspective of the right of confrontation insofar as it is guaranteed by the Sixth

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15. 223 U.S. at 458. The force of the *Hopt* and *Lewis* holdings was further diminished by Mr. Justice Cardozo, writing for the Court in Snyder v. Massachusetts, 291 U.S. 97 (1934), who said that "*Hopt* v. *Utah* . . . has been distinguished and limited" (291 U.S. at 106) and "what was said in *Hopt* v. *Utah* . . . on the subject of the presence of a defendant was dictum, and no more . . . We may say the same of *Lewis* v. *United States* . . . with the added observation that it deals with the rule at common law and not with constitutional restraints." (291 U.S. at 117, ft.).

The failure to recognize the defects of *Hopt* and *Lewis* is what led the majority of the Court of Appeals below into error in voiding the conviction of Allen. For the decision below reverses "in light of" these opinions, together with Shields v. United States, 273 U.S. 583 (1927). See Appendix 62-63. *Shields* holds merely that "the rule of orderly conduct of jury trial" entitles a defendant to be present when additional instructions are given to the jury. The Sixth Amendment was in no way involved, or even discussed, and the *Shields* Court cited only a civil case in support of its holding. See 273 U.S. at 588-89.

Amendment,[16] and at common law, both before and after the adoption of the Amendment, shows that (1) the presence of a defendant was once a jurisdictional requisite to the trial of all felony cases, (2) this strict rule is now applied only in capital cases,[17] (3) a defendant may waive, by word or deed, his right to be present in all other felony cases, and (4) such waiver may be expressed or implied.[18]

B.

The Power Of A Trial Court To Expel An Unruly Defendant.

We turn now to an examination of the principle directly at issue in this case: Can a defendant in a noncapital felony case waive his right to be present during portions of his trial when his contumacious conduct compels the trial judge to expel him so that the trial may proceed in an orderly fashion?[19] Or is a finding of

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16. Now enforcible directly against the states through the vehicle of the Due Process Clause of the Fourteenth Amendment. See Pointer v. Texas, 380 U.S. 400 (1965).

17. But see People v. De Simone, 9 Ill. 2d 522, 138 N.E. 2d 556 (1956).

18. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934).

19. We do not argue here the questions (1) whether Allen's conduct was sufficiently disturbing to require expulsion, assuming the trial court possessed such a power, and (2) whether alternative remedies might have been more properly employed. Those points are discussed *infra* at pp. 23-28 and 19-22.

"waiver" under these circumstances precluded by the Confrontation Clause of the Sixth Amendment?

When the Supreme Court of Illinois affirmed Allen's conviction on direct appeal, it did so on the basis of its prior opinion in *People* v. *De Simone*, 9 Ill. 2d 522, 138 N.E. 2d 556 (1956). The *De Simone* opinion, upholding the exclusion of a contumacious defendant, relied upon past Illinois cases which, although clearly consistent with the decisions of this Court,[20] dealt only with the voluntary absence of a defendant.

When the case was collaterally examined, after a habeas petition was filed in the District Court, apparently the research below did not disclose the existence of any direct precedent and the cause was dealt with by the habeas judge, the majority of the Court of Appeals, and the dissenting judge there, as a case of first impression, to be decided by reason and analogy.[21]

But precedent—long recognized, sound and respectable precedent—does exist.

From early days, *and without dissent*, the right of a defendant to be present at all stages of his trial has been qualified by the exception that such right is waived when the courtroom behavior of the defendant is so disturbing as to compel his removal and the continuation of the trial during his absence.

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20. For example, Sahlinger v. People, 102 Ill. 241 (1882), upon which the *De Simone* court relied (9 Ill. 2d at 533), was cited with approval in Diaz v. United States, 223 U.S. 442, 455 (1912).

21. The precedents of People v. De Simone, 9 Ill. 2d 522, 138 N.E. 2d 556 (1956) and People v. Allen, 37 Ill. 2d 167, 226 N.E. 2d 1 (1967), of course, aside.

This qualification was first recognized by the famous English authority on criminal law, Sir James Fitzjames Stephen, who said that:

> "If a prisoner so misconducts himself as to make it impossible to try him with decency, the Court, it seems, may order him to be removed and proceed in his absence."[22]

This view has been reiterated time and again by both the English and American commentators who unanimously recognize such a power in the trial court.[23]

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22. Stephen's Digest of Criminal Proced., Art. 302 (1883).

23. "In cases where the defendant may waive his right to be present, if his conduct is such that it is necessary to remove him temporarily from the courtroom, such temporary absence will not affect the validity of the trial", Clark's Criminal Procedure, §148, p. 495 (Mikell ed. 1918); "No trial (a) for felony can be had except in the presence of the defendant, and he must, it is said, stand in the dock to be tried. . . . If he creates a disturbance it is said that the trial may go on without his presence", Archbold's Criminal Pleading, Evidence and Practice, p. 179 (Ross & Butler, 28th ed. 1931); "In cases of felony the prisoner must be in the dock during the whole of the trial unless he is so violent as to render a trial in his presence impossible", Harris & Wilshere, Criminal Law, p. 396 (14th ed., London 1933); "Disorderly conduct of the prisoner at the trial, such in degree that it cannot go on, has been held to justify the court in removing him, and proceeding in his absence", 1 Bishop's New Criminal Procedure, p. 179 (4th ed. 1895); "It is perfectly clear that the accused has a right to be present in court throughout his trial although there is some authority for the proposition that the defendant may be excluded from the courtroom, and the trial may

Moreover, there are decided cases, again both English and American, which are precisely in point and, again, are unanimous in upholding the power of a trial court to expel an unruly defendant if his conduct precludes the possibility of an orderly trial.

The principle was apparently first propounded in a reported case in *United States* v. *Davis*, 25 Fed. Cas. 773 (No. 14, 923) (C.C.S.D., N.Y. 1869).

In *Davis*, the defendant, a prisoner in custody, had been indicted for perjury and, after selection of the jury, repeatedly interrupted the opening statement of the District Attorney, despite admonishments by the court. When he persisted in such conduct he was ordered removed from the courtroom despite the objection of his counsel and the trial resumed. On the next day, "the defendant having become composed", the case concluded. On a motion for new trial the defendant urged his involuntary removal from the courtroom as error. In denying the motion, the District Judge held:

> "This statement [of the facts] seems sufficient to dispose of the point in question. The right of a

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go on without him, if he persistently creates disturbances and disrupts the trial", FELLMAN, DEFENDANT'S RIGHTS UNDER ENGLISH LAW, p. 68 (U. WIS. PRESS 1966); BOWEN-ROWLAND, CRIMINAL PROCEEDINGS ON INDICTMENT AND INFORMATION (2d ed., Stevens & Sons, Lt., London 1910); MURRAY, *The Power To Expel A Criminal Defendant From His Own Trial: A Comparative View*, 36 U. COLO. LAW REV. 171 (1964). The only contrary suggestion is to be found in ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, p. 414 (1947), where it is said that "possibly the better course, even in such a case, is to put the defendant under whatever restraint is necessary to allow the trial to continue", although the precedent of expulsion is also recognized.

prisoner to be present at his trial does not include the right to prevent a trial by unseemly disturbance. The defendant had the opportunity to be present at the whole of his trial. He was, in fact, present while the jury were being empanelled and the evidence was being introduced. He was absent during a part of the opening, only because of his own disorderly conduct. It does not lie in his mouth to complain of the order which was made necessary by his own misconduct, and which he could at any time have terminated by signifying his willingness to avoid creating disturbance."[24]

The question was next raised in *Regina* v. *Berry,* 104 L.T.J. 110 (Northhampton Assizes 1897), where the court removed a defendant, on trial for burglary, who tore off his clothing, struggled with the wardens, and uttered "loud cries, which, so far as they were understood, were totally irrelevant to the charge."

In *Rex* v. *Browne,* 70 J.P. 472 (London Cent. Crim. Ct. 1906), the defendant, accused of obtaining property by false pretenses, screamed and shouted in the dock after being warned that the trial would proceed in her absence if she persisted. She did persist, was removed from the courtroom and the trial continued. The trial judge held that there was "quite sufficient authority for this course", relying upon the authority of Sir James Stephen, *Regina* v. *Berry,* and an earlier unreported case before Lord Blackburn on the Western Circuit.

Though all of the reported case authority was decided by trial courts, two propositions lend added weight to their force as precedent. First, there are no contrary cases on point. No court, trial or appeal, has ever held the involuntary expulsion of an unruly defendant to be

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24. 25 Fed. Cas. at 774.

error, constitutional or otherwise. Second, the correctness of the views of the case authority and the commentators has been explicitly suggested by this Court.

In *Diaz* v. *United States*, 223 U.S. 442 (1912), this Court cited with approval the case of *Davis* v. *United States* for the proposition that if a defendant "voluntarily absents himself, this . . . operates as a waiver of his right to be present and leaves the court free to proceed. . . ."[25] Since the principle of voluntary absence was neither involved nor discussed in *Davis*, the *Diaz* Court must have concluded that *involuntary* absence for contumacious conduct was the equivalent of *voluntary* absence insofar as the reach of the Sixth Amendment was concerned.[26]

That this is so was made clear by Mr. Justice Cardozo, writing for the Court in *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934). Prefacing his discussion of whether a jury view of the scene in the absence of the defendant, and over his objection, violated the Confrontation Clause, Justice Cardozo declared that though the right of confrontation was guaranteed by both the federal and state constitutions, there was "*no doubt* the privilege may be lost by consent *or at times even by misconduct.*"[27] The legal effect of exclusion for misconduct, the opinion concluded, was an "imputed waiver" of the Sixth Amendment right to be present throughout the trial. In support of this conclu-

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25. 223 U.S. at 455-56.

26. This, of course, was precisely the reasoning and holding of People v. DeSimone, 9 Ill. 2d 522, 533, 138 N.E. 2d 556 (1956), the precursor of *Allen*. See text, *supra*, at p. 14.

27. 291 U.S. at 106 (Emphasis added.)

sion, the Court cited *Diaz* and Sir James Fitzjames Stephen, Digest of the Law of Criminal Procedure, Art. 302.[28]

Throughout the course of Anglo-American criminal jurisprudence, therefore, it has been uniformly held—in the cases and by the commentators, with the repeated and explicit approval of this Court—that the Sixth Amendment does not preclude the involuntary removal of a defendant who, by his conduct in the courtroom, asserts a right to destroy the orderly pursuit of justice.

C.

The Rule Of Discretion And The Contumacious Defendant.

If the federal constitution does not in all cases mandate the continued presence of a contumacious defendant, then what rule ought this Court administer in the enforcement of the Sixth Amendment guarantee? We have concluded that, by reason and authority, the rule is one of discretion—to be fitted to the facts of each case in the light of the interests involved.

There are, in theory, three sanctions available to a court faced with the disruption of a trial by a defendant who refuses to respect the dignity and decorum of the courtroom: (1) the summary punishment of contempt; (2) physical restraint, including the presence of guards, shackling and gagging; (3) removal from the courtroom.[29]

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28. 291 U.S. at 106. *Diaz,* it will be remembered, had, in turn, cited with approval the *Davis* case—the first reported decision upholding the power of a trial court to expel an unruly defendant.

29. See the discussion in Murray, *The Power To Expel A Criminal Defendant From His Own Trial: A Comparative View,* 36 U. Colo. L. Rev. 171-72 (1964).

The contempt sanction, of course, does not conflict at all with the right to be present at trial. And its use, or even its threat, may, in some cases, be sufficient to dissuade the unruly defendant. And, if so, restraint of the defendant would be, for state law purposes, reversible error, and expulsion would be, for federal constitutional purposes, inconsistent with the protections of the Sixth Amendment.

But cases can easily be hypothesized where the threat, or even the employment, of a contempt citation will little avail a judge faced with a defendant determined to mock the judicial process. For the power of a trial judge to summarily punish for contempt is not unlimited.

The punishment which may be imposed can pale to insignificance when compared with the sentence which the defendant may receive if convicted of the substantive offense charged.[30] It has never before been thought that the Constitution of the United States even suggests, much less compels, this spectacle of judicial impotence in the face of a threat to the orderly administration of justice, without which no rights can be respected or enforced.

The usual case of disruption, or the threat of violence or escape, may be deterred or overcome by the employment of guards or handcuffs. The presence of guards, however, will not deter the defendant who seeks, not to escape, but on the contrary, to remain in the courtroom and disrupt the proceedings by shouts and interruptions,

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30. For example, the trial judge here could have sentenced the respondent Allen, if convicted of robbery, to a sentence of one year to life in the penitentiary. See Ch. 38, §501 Ill. Rev. Stat. (1955).

unless continued physical violence to his person is to be the rule. The use of handcuffs or similar restraints will be of no value in enforcing a condition of order and quietude. And so the trial judge may be compelled to escalate the use of force by gagging as well as shackling.

This course, though it has the approval of some courts,[31] and was mandated as the only constitutional alternative by the court of appeals below, may have several severely prejudicial consequences.

First, the employment of shackles and gags may so revolt a jury that its sympathies are necessarily turned to the defendant's favor, contrary to, and in diminution of, the force of the evidence which the state has marshalled against the accused. This is a high, indeed an intolerable, and, quite unnecessary, price to pay for the guarantee of the right to confront one's accusers.[32]

Second, the conduct of the defendant may be so extreme as to require the employment of restraints to the degree that a defendant is totally immobile and speechless. Only the most slavish reading of the Sixth Amendment could justify such a course on the ground that this does not violate the right of confrontation, though exclusion would. To say that a defendant, bound and

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31. State v. VanBogart, 85 Ariz. 63, 331 P. 2d 597, 599, 600 (1958); United States v. Bentvena, 319 F. 2d 916, 930 (2d Cir. 1963).

32. It is also ironic in light of the early view that the right of confrontation existed for the benefit of the state as well as the accused. See text, *supra*, at p. 8-9.

gagged, may meet his accusers face to face, while the excluded defendant is denied this opportunity is nonsense."[33] Moreover, this extreme course, where improperly employed, would at once violate not only the Sixth Amendment, but would also diminish the right of the state to a fair trial free from the wrath of a jury who cannot turn its eyes away from the writhing mute in the defendant's seat.

This leaves the third alternative of expulsion. Admittedly, this course is most at odds with the right of confrontation, save for those cases where physical restraint renders a defendant both silent and immobile. But if the Sixth Amendment does not forbid it, as we have demonstrated, its employment accomplishes at least two desirable results—the end of the disruption of the judicial process, and the avoidance of jury hostility to the prosecution. Moreover, as this case readily demonstrates, the defendant remains free to end his absence at the precise moment he signifies that he is willing to respect the orderly administration of justice.

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33. The words of the earliest commentators, in explaining the right of defendants to appear unfettered in courts of justice, are especially apt here. "The prisoner is to be brought to the bar without irons, shackles, or other restraint, unless there is danger of escape; and 'ought to be used with all humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt and the misfortune of his present circumstances' . . . 'they [felons] shall be out of irons and all manner of bonds, so that their pains shall not take away any manner of reason, nor constrain them to answer but at their free will,'" ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, p. 173 (Ross & Butler, 28th ed. 1931).

When the sanctions available—contempt, restraint, and removal—are employed by a trial court which has in mind the interests involved—the right of the accused to be present, including the opportunity to confer with counsel and participate in the decisions of the trial; the right of the state to a fair trial free from the involuntary production of jury sympathy for the fettered accused; the right of the defendant to a fair trial free from the hostility of a jury toward an accused who is thought to be violent or dangerous; and the basic necessity of a trial free from disorderly interruption and spectacle—it must be concluded that the only rule to be followed is one of discretion in the trial court to fit the sanction to the situation, subject, of course, to review by this Court in cases of abuse of discretion which transgresses constitutional limits.

Such a rule is followed in Illinois. Such a rule was employed by the trial court whose decision is now on review here. And, as we shall now demonstrate, such discretion was properly exercised in this case.

D.

The Respondent Allen Was Properly Expelled For His Conduct.

The respondent Allen during both his pretrial and trial appearances clearly presented his intentions regarding the administration of criminal justice in his cause.

The Supreme Court of Illinois, in reviewing both the respondent's actions at trial and his absolute constitutional claim to presence at his trial, regardless of personal conduct, concluded that the record ". . . is replete with rude, boisterous and disrespectful conduct of the defend-

ant toward the court and its orders" and that the "trial judge was both patient and tolerant."[34]

With these findings there can be no dispute. The Court of Appeals for the Seventh Circuit also deemed respondent's trial behavior to have been both "disputive and disrespectful" and stated that it could ". . . sympathize with the plight of the judge in the instant case and think he showed commendable patience under severe provocacations. . . ."[35]

Turning to the trial record in this matter, it soon becomes eminently clear why these two courts of review concluded as they did with respect to the respondent's conduct.

During the *voir dire* examination of the first prospective juror by the respondent, and after the asking of many irrelevant questions, the trial judge requested that Allen confine his inquiry solely to juror qualifications. Allen began to argue with the judge in what the Court of Appeals characterized as a ". . . most abusive and disrespectful manner."[36] This dialogue was to include the following threat and subsequent warning:

> The Defendant: There's no trial. If you try to make me sit down, there is going to be ranting in the courtroom and you'll have to carry me out, and I want to be present here at my trial all through the trial. I'm going to talk.
>
> The Court: You will be permitted to be present at this trial.
>
> The Defendant: That's right.

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34. 226 N.E. 2d at 3.

35. 413 F.2d at 235.

36. 413 F.2d at 233.

The Court: (Continuing)—so long as you conduct yourself in accordance with the law and with the dignity and propriety of the court and no longer (A. 24-25).

After further informing the court that he, Allen, was not going to remain quiet (A. 25), the respondent terminated his remarks by saying: "When I go out for lunch time, you're [the judge] going to be a corpse here" (A. 25). At this point Allen tore the file which his attorney had and threw the papers on the floor (A. 25). The trial judge then stated to the respondent: "One more outbreak of that sort and I'll remove you from the courtroom" (A. 25). Despite this second warning Allen continued as follows:

The Defendant: You have the right to restrain me, but you haven't got the right to remove me and you're not going to remove me.

The Court: I'll determine that.

The Defendant: No, you're not. There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial (A. 26).

After what the Court of Appeals describes as more "abusive remarks", the following removal occurred:

The Court: Mr. Bailiff, you will remove the defendant.

The Defendant: I want to be present in the courtroom when my trial is going on.

The Court: You may be present—

The Defendant: I'm going to be present.

The Court: (Continuing)—if you conduct yourself properly.

> We will proceed, in the absence of the defendant, who, by reason of his conduct is interfering with the proper trial of the case, wilfully and deliberately.
>
> (Thereupon, the defendant was taken out of the courtroom) (A. 26-27).

Subsequently, after the completion of jury selection, and before the presentation of the state's case, the trial judge extended—through defense counsel—an invitation for the respondent to return:

> And I wish you'd also advise him, at two o'clock, when the matter is resumed, that he may return to the courtroom, if he will agree to remain silent and obey the order of the court and respect the decorum of the court (A. 29).

After a court recess, and before the resumption of formal proceedings before the jury, Allen was brought before the court (A. 30). The trial judge then proceeded to inform the respondent that he, Allen, would be permitted to remain in the courtroom if he would agree to conduct himself properly (A. 30-31), to which Allen replied: "You ain't scaring me, Judge" (A. 31).

The trial judge then persisted in his attempt to have the respondent agree to accept his offer to return (A. 31). Allen's reply was: "I have the right to conduct myself any way I see fit, when I'm getting an unfair trial—and this is an unfair trial" (A. 31).

Despite the failure of the judge to acquire an affirmative indication of proper conduct by the respondent, the judge was willing and did give Allen an opportunity to remain (A. 32).

Thereafter the jury was brought in and the state was directed to proceed (A. 32). Allen immediately pro-

voked another confrontation with the judge and his second removal obtained:

> The Defendant: No. There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.
>
> The Court: Remove the defendant.
>
> The Defendant: I want to be in court.
>
> The Court: (Continuing)—and we will proceed through the trial without his presence.
>
> The Defendant: No, you're not going to proceed through the trial without my presence.
>
> (Thereupon, the defendant was taken from the courtroom) (A. 33).

Opening statements were made and the state presented its first witness (A. 33-37). The respondent was then called into the courtroom for purposes of identification. While there Allen requested that he remain in the courtroom. The following transpired:

> The Defendant: I want to stay in the courtroom.
>
> The Court: You may stay whenever you promise me to conduct youself properly.
>
> The Defendant: I'll promise you shit.
>
> (Thereupon, the defendant was taken out of the courtroom) (A. 38).

The next day, after conclusion of the state's case, and before the commencement of the defense, the trial judge again offered the respondent the opportunity to remain in the courtroom (A. 43). After the judge gained some assurance from Allen that he would not disturb the proceedings of the court, the respondent was permitted to stay through the remainder of the trial. Relative calm

was to prevail when evidence thought favorable to Allen's defense was introduced.

Senior Circuit Judge Hastings in his dissent reasoned that "[Allen] was given [his Sixth Amendment] right in this case, but made his own free choice to *voluntarily* reject his enjoyment of it."[37] Judge Hastings read the respondent's "gross misconduct" to indicate that Allen ". . . was brazenly determined to make a shambles of the criminal judicial process, unless he was permitted to dictate the rules of the game."[38]

The Supreme Court of Illinois concluded ". . . that the record reflects defendant's *awareness* of his right to conduct his own defense and his *deliberate* attempt to use this right to obstruct the trial. By such conduct, he *waived* any constitutional right to be present, confront the witnesses against him and conduct his own case at the times he was excluded from the courtroom."[39]

With respondent Allen's disgraceful conduct being a matter of pure and deliberate volition, to charge the trial court with exercising anything less than proper judicial discretion in interpreting the "waiver by misconduct" readily apparent herein, is to read into that concept a standard manifestly unfair to the proper administration of our criminal justice system.

Perhaps the issue was framed most appropriately by this Court in *Diaz*:

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37. 413 F.2d at 235 (Emphasis added.)

38. 413 F.2d at 235.

39. 226 N.E. 2d at 3-4 (Emphasis added.)

"The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of law, paralyze the proceedings of courts and juries and turn them into a solemn farce. . . ."[40]

CONCLUSION

The State of Illinois respectfully requests that the judgment of the Court of Appeals for the Seventh Circuit be reversed.

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40. 223 U.S. at 458, quoting with approval from *Falk* v. *United States*, 15 App. D.C. 446, 460 (1899).